BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF SHEBOYGAN

and

AMERICAN FEDERTION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2039, AFL-CIO

Case 123
No. 63423
MA-12584

Appearances:

James R. Scott, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of the City.

Helen Isferding, District Representative, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union**.**

ARBITRATION AWARD

The City of Sheboygan, hereinafter referred to as the City, and the American Federation of State, County and Municipal Employees, Local 2039, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration, the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the denial of payment for orthotic inserts. Hearing on the matter was held in Sheboygan, Wisconsin on May 19, 2004. Post hearing written arguments were received by the Arbitrator by July 14, 2004. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the issues and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issues as follows:

"Is the grievance arbitrable?"

"If yes, did the City violate the collective bargaining agreement when it denied the Grievant a second pair of orthotic inserts?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV

SECTION 1. GRIEVANCE PROCEDURE

The Employer representative and the Union representative shall from time to time designate the time and place of meetings for the purpose of the adjustment of grievances. Definition: Any difference or misunderstanding which may arise between the Employer and employee or the Employer and the Union regarding wages, hours, and conditions of employment as provided in this Agreement shall be processed as follows: All grievances shall state the issue involved, the relief sought, the date the alleged violation took lace, and the specific section or sections of the Agreement that were violated.

The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases, except as expressed provided under the terms of this Agreement.

. . .

ARTICLE VIII

INSURANCE

SECTION 1. HOSPITAL, SURGICAL, MAJOR MEDICAL, DIAGNOSTIC, AND DENTAL INSURANCE

(a) The City shall provide a group health insurance program comparable to the Trustmark Insurance Plan Document Summary of the City Plan provided to Local 2039, AFSCME, AFL-CIO employees in effect on December 31, 1997, including utilization management. "Comparable" shall mean a level of benefits which, viewed as a whole, leaves the covered individual no worse off as a result of the change.

Effective on or about August 1, 1998, for the drug card change (4 below) and effective on or about November 1, 1998, for the other changes (1-3 and 5-9), below, the following enumerated items will also be included:

The Preferred Provider Organization (PPO) based plan shall contain no deductibles. Until both the City and Local 2039, AFSCME ratify the 2001-2002 contract, in network services shall be covered at one hundred percent (100%) of the discontinued PPO amount and ninety percent (90%) for out-of-network services. The ninety percent (90%) payment for off-network services applies to the lower of the amount billed by the provider, up to the usual, customary, and reasonable maximum for the procedure, or the final liability of the covered person after any write-off applied by the provider of the service. Effective upon ratification of the 2001-2002 contract by both the City and Local 2039, AFSCME, in network services shall be covered at one hundred percent (100%) of the discontinued PPO amount after co-pay, and eighty percent (80%) for out-of-network services after co-pay. The eighty percent (80%) payment for off-network services is applied after the co-pay and applies to the lower of the amount billed by the provider, up to the usual, customary, and reasonable maximum for the procedure, or the final liability of the covered person after any write-off applied by the provider of the service. Through December 31, 2001, the employee out-of-pocket limits shall be one thousand dollars ($1,000.00) per person with a maximum of three thousand dollars ($3,000.00) per family. Effective January 1, 2002, the employee out-of-pocket limits shall be one thousand five hundred dollars ($1,500.00) per person with a maximum of four thousand five hundred dollars ($4,500.00) per family (excluding drug co-pays, any penalties for non-compliance with pre-certification, amounts not paid when off-network providers change over the UCR level, amounts over stated plan limits for specific types of services, services not medically necessary, and excluded types of services).

Employees do not need referrals to providers outside the PPO.

Effective January 1, 2000, the major medical lifetime limits shall be two million dollars ($2,000,000.00) The regeneration provisions of the prior major medical package shall be eliminated effective January 1, 1999.

. . .

In the event the City opts to become self-insured for health insurance, the City agrees to comply with all State of Wisconsin insurance mandates.

. . .

ARTICLE XVI
MAINTENANCE OF BENEFITS

The Employer agrees to maintain existing benefits which are mandatory subjects of bargaining not specifically referred to in this document.

. . .

PERTINENT MEDICAL BENEFIT PLAN PROVISIONS

2.28 Medically Necessary or Medical Necessity:
means

A. A service, drug, supply, or equipment which is necessary and appropriate for the diagnosis or treatment of a Disability, Mental Disorder, and Chemical Dependency in accordance with generally accepted standards of medical practice in the U.S. at the time the item is provided as determined by the Claim Administrator with assistance from the Utilization Review Organization. Consideration shall include what is clinically appropriate in terms of type, frequency, extent, site and duration. When specifically applied to a Confinement it further means that the diagnosis or treatment of the Covered Person's symptoms or condition cannot be safely provided to that Covered Person on an outpatient basis.

B. A service, drug, supply, or equipment shall not be considered as Medically Necessary if it:

1) is investigational, Experimental, or for research purposes;

2) is provided solely for the convenience of the patient, the patient's family, Physician, Hospital or any other Healthcare Provider;

. . .

2.29 Medical Supplies

A. Items which are:
1) primarily used to treat a Disability, Mental Disorder, or Chemical Dependency;
2) generally not useful to a Covered Person in the absence of a Disability, Mental Disorder or Chemical Dependency;
3) the most appropriate item which can be safely provided to a Covered Person and accomplish the desired end result in the most economical manner; and
4) prescribed by a Physician.

B. The item's primary function must not be for comfort or convenience.

. . .

3.7 Medical Supplies

Medical Supplies include, but are not limited to:

. . .

C. Casts, splints, trusses, crutches, orthopedic braces and appliances, custom-made orthoses;

BACKGROUND

The fundamental facts in the instant matter are not in dispute. The City has a self funded insurance program. The third party administrator is Prairie States Enterprises, Inc., hereinafter referred to as Prairie States, and the medical benefit plan has an appeals procedure. The instant matter arose when employee Scott Tetschlag, a painter in the City's Department of Public Works, hereinafter referred to as the Grievant, requested a second pair of orthotic inserts. Accompanying his request was the following letter from his doctor:

July 1, 2003

Prairie States
Re: Scott Tetschlag

To whom it may concern:

Scott has been molded for custom foot orthotics crafted by Ed Glaser, DPM of Tennessee, and they are working well for him. His foot overpronation and low back pain have responded beautifully to the correction.

Scott is very tall, has large feet, and is quite athletic. He needs a separate pair of orthotics with a more rigid arch for athletics ("Sole Supports", with their unique full-arch contact and 100% foot overpronation correction are custom grinded based upon body weight and foot flexibility).

Scott was wondering if I could explain the above for him and if you would possibly consider a second pair of Sole Supports "medically necessary".

Sincerely,

David Holtrop /s/
David Holtrop, DC

The Grievant's request was denied by the City's Risk Management Committee on July 30, 2003. The Grievant appealed this decision in accord with the City's medical benefit plan. Thereafter, on February 11, 2004 the City received the following letter from Prairie States:

> February 11, 2004
>
> Ed Surek
> City of Sheboygan
> 828 Center Avenue
> Sheboygan, WI 53081
>
> Re: Orthotics
>
> Dear Ed,
>
> Prairie States authorizes orthotics according to the Plan Document. Article 3, subsection 3-7 Medical Supplies – C. This article states "custom made orthoses". This would exclude any that area brought over the counter – regardless if there is a prescription.
>
> Prairie States authorizes the replacement of orthotics based on industry standard. The industry standard for durability is a minimum of 3 to5 years. Prairie States replaces them based on this industry standard.
>
> Duplication of durable medical equipment would not be covered as the Plan states in section 2.28-B-2 and in section 2.29-B items for convenience not covered.
>
> If I can be of further assistance, please do not hesitate to contact me.
>
> Sincerely,
>
> Pat Wolff /s/
> Pat Wolff, RN
> Utilization Management

On February 24, 2004 the City's Human Resource Director, Edward Surek, sent the following denial to the Grievant:

> February 24, 2004
>
> Scott Tetschlag
> 4050 S 14th Street
> Sheboygan, WI 53081

Dear Mr. Tetschlag:

As you know, the Risk Management Committee met February 24, 2004, and again reviewed your Chiropractor's letter and addressed your request for a pair of orthotics.

The Committee's motion was to deny your request and also approved adherence to the industry replacement standard of three years. The motion passed unanimously.

Should you have any questions, please feel free to call.

Sincerely,

Ed /s/
Edward V. Surek
Risk Management Committee

cc: Human Resources

Thereafter, the instant grievance was filed and processed to arbitration in accord with the parties' collective bargaining agreement's grievance procedure.

The instant matter is the first instance appealing a decision of the City's Risk Management Committee. At the hearing the City raised, for the first time, that the medical benefit plan's appeal procedure is the exclusive remedy for addressing coverage issues under the plan. At the hearing the Union also introduced the following letter from the Grievant's doctor:

May 18, 2004

Re: Scott Tetschlag

Mr. Tetschlag presented to my office on 5-10-04 with some lumbo-sacral discomfort. During our visit he asked me about foot orthotics and if I carried the Sole Support brands. He explained to me that he has been in negotiations with his insurance company about getting a second pair. Heavy wear and tear that his current ones are subject to, i.e. wearing them in work boots all day including outdoors in rain and snow has resulted in them breaking down rather quickly. When I looked down at them it was obvious the covering would soon need to be replaced.

Secondly, Mr. Tetschlag and I discussed how much he has benefited from his orthotics. His significant overpronation of the feet, internal rotation and stress to the knees as well as lower back pain all have improved with wearing of the orthotics. The design of the orthotics is completely customized to the point that we will go into great detail the kind of shoe and the kind of activities that a person will be into while wearing them. To build one for a work boot worn all day on heavy concrete will differ from one designed to wear in an athletic shoe and or a more restrictive formal shoe. In many people's case, wearing them during an eight hour workday would suffice in controlling their problem and not allowing symptoms to fester. With the case of Mr. Tetschlag, an orthotic designed for an athletic shoe would allow him to benefit more from proper biomechanical alignment outside the work environment. Reviewing of his file in terms of chiropractic treatment his necessity of care has dropped significantly since using the Sole Support orthotic.

Unfortunately orthotics for adults are like glasses, they correct the problem while you wear them, but they don't treat the condition. Mr. Tetschlag will most likely need to wear orthotics for years to come and quite honestly will benefit the most if he wears them as much as possible.

Sincerely,

Dr. Joe Dirker /s/
Dr. Joe Dirker

The Grievant testified at the hearing that he has had chronic back pain for years. As part of his case management orthotic inserts were ordered for the Grievant. The Grievant wears the inserts in his work shoes. In discussions with his doctor it was determined that orthotic inserts with a more ridged arch would be beneficial for the Grievant when he participated in athletic activities such as golf, basketball, and other types of activities. The Grievant also testified that he became aware two other employees, Tom Pitsch and Pat Dugan, got two (2) inserts within two (2) years. Tom Pitsch, President of the Union, testified that his orthotic inserts needed an adjustment to the arch. He further testified that when he originally requested the change it was denied. Pitsch also testified that when he contacted the City's Human Resources Department the decision was reversed and he received his second orthotic inserts.

The City's Human Resource Director Edward Surek testified that the medical benefit plan defines what "medical necessary" is and that the plan administrator, Prairie States, interprets the plan. Surek also testified that appeals are made to the City's Risk Management Committee. On cross examination Surek acknowledged the medical benefits plan does not limit the number of orthotic inserts and that he was unaware if anyone on the City's Risk Management Committee had any medical expertise. Surek, on redirect, testified that Section 2.28, B. (2)of the medical benefit plan limits the number of orthotic inserts.

Michael Reichelsdorfer, Vice President of Operations for Prairie States testified the medical benefits plan required pre-certification for all medical necessary equipment. Reichelsdorfer further testified that Registered Nurses applied the medical equipment standards. Reichelsdorfer also testified that participating in athletics was a convenience, not a medical necessity.

CITY'S POSITION

The City contends the grievance is not arbitrable. The City contends that while the collective bargaining agreement specifies some coverage and benefit standards it is silent concerning administration of the health insurance plan. The City asserts the health insurance summary plan description is not incorporated into the labor agreement and the only mandate in the collective bargaining agreement is that if the City determined to become self insured for health insurance it would comply with all State of Wisconsin health insurance mandates. The City points out that the summary plan details the types and terms of coverage and benefits, and, more importantly, contains an appeal process. The City contends the Grievant availed himself of this appeal process. The City also contends the appeal process is the exclusive remedy for addressing coverage or benefit issues. The City argues the collective bargaining agreement's definition of a grievance, while admittedly broad, requires a dispute over wages, hours and conditions of employment. The City avers the collective bargaining agreement is silent concerning any requirement the Grievant is entitled to two (2) pairs of orthotic inserts or that employees are entitled to challenge decisions made by third party administrators via the grievance procedure. The City, acknowledging that arbitrators have particular expertise in the law of the workplace, argues arbitrators would not be in a position to evaluate what is medically necessary treatment.

The City also contends Prairie States is the third party administrator and that it is the third party administrator, not the City, that makes benefit determinations. The City argues the decisions made by the plan administrator are no more grievable than if an independent insurer was making the benefit decision. In support of its position the City points to CLARK COUNTY, Case 99, No. 53928, MA-9490 (5/1997). Therein the arbitrator held that a grievance over benefit coverage under a self-insured plan was not substantially arbitrable. The City contends the instant matter is essentially the same case and the collective bargaining agreement has similar language limiting the Arbitrators authority in a similar manner. The City contends that a contrary holding to CLARK COUNTY would render the City as the insurer and place benefit determination within the contractual grievance procedure.

The City also contends the Grievant has no medical necessity for a second pair of orthotic inserts. The City acknowledges the Grievant's chiropractor submitted a letter to Prairie States requesting a second pair of orthotic inserts. The City contends the request was denied based upon medical standards for orthotic inserts. The City points out such devices are intended to last three to five years and one pair is received every three (3) to five (5) years.

The City argues that after the grievance was filed the face of the grievance changed. The City contends the original grievance requested was for a replacement orthotic insert. The City also points out the Grievant's doctor stated the Grievant really needs the orthotic inserts for his athletic pursuits. The City concludes that right or wrong the Third Party Administrator made a decision applying medical standards. The City argues any Third Party Administrator must apply standards in order to make benefit determinations The City contends the fact the grievant is an active athlete does not justify a departure from uniform standards. The City contends fair or not, athletic pursuits do not fall within the definition of "medical necessity."

The City would have the Arbitrator deny the grievance.

UNION'S POSITION

The Union contends Article VIII, Insurance, and Article XVI, Maintenance of Benefits were violated by the City's actions and that such a violation falls with the collective bargaining agreement's definition of a grievance. The Union stresses the issue of arbitrability was first raised at the arbitration hearing. The Union argues the level of benefits is defined by past practice and noted in Article VIII, Section 1, (a) and Article XVI. The Union contends the grievance is arbitrable because the collective bargaining agreement references both the level of benefits and the maintenance of benefits as part of the collective bargaining agreement and therefore subject to arbitration. The Union also points out the collective bargaining agreement does not specifically exclude insurance subjects from arbitration and without arbitration the City could void the whole insurance plan. The Union concludes that to pay or not pay for a second pair of orthotic inserts fits the definition of a grievance and is not excluded from the arbitration process.

The Union contends that the second pair of orthotic inserts sought by the Grievant is different from the first and not a matter of convenience. The Union argues insurance coverage is not limited to medical coverage that is needed to just the working part of life. The Union argues the need for the second pair is prescribed in the July 1, 2003 letter (the Grievant is tall, has large feet and is quite athletic). The Union asserts this is not a matter of fashion statement or a desire to have different colored orthotic inserts. The Union contends it is a matter of need, not a matter of two pair with the same prescription. The matter is one pair for work and one for sports. The Union stresses the City's medical benefit plan, Section 2.1 has an "Actively at Work Definition" but it does not appear in Section 2.16 "Durable Medical Equipment". The Union concludes there is therefore no limitation to certain activities. The Union also stresses the definition of medical equipment has no time lines for usage only requiring the item withstand repeated use, has a medical purpose, is not useful to a person in absence of medical disability, used in the home, and prescribed by a physician. The Union concludes the second pair of orthotic inserts fits this definition and should be paid.

The Union also contends the City's medical benefit plan has no restriction on a second pair if the prescription is different. The Union stresses the City's medical benefit plan has no limitations at all and is silent concerning replacement standards. The Union point's out Pitsch

received another orthotic insert after only one and one half (1½) years. The Union concludes this

demonstrates no time restrictions on repeat same prescriptions.

The Union requests the Arbitrator to sustain the grievance.

DISCUSSION

In arguing the instant matter is not arbitrable the City has asserted the collective bargaining agreement is silent concerning the level of health insurance benefits. The Arbitrator finds no merit in this argument. Article VIII of the parties' collective bargaining agreement allows the City to self-fund insurance. Article VIII, Section 1, (a), also requires the City to provide a group health insurance program comparable to the Trustmark Insurance Plan Document Summary in effect on December 31, 1997. Article XVI requires the City to maintain existing benefits which are not specifically referred to in the collective bargaining agreement. The City's position, in effect, would render these provisions meaningless. Thus the City is required by Article VIII and Article XVI to maintain a certain level of benefits, even if as herein it determines to self-fund its insurance program. This requirement that the City maintain the level of benefits in effect on December 31, 1997 is subject to the parties' grievance procedure.

The City has also pointed to CLARK COUNTY in support of its position that the instant matter is not subject to the grievance procedure. However, CLARK COUNTY is distinguishable from the instant matter. CLARK COUNTY did not contain a provision mandating maintenance of benefits. Therein, the appeal of a denial of a benefit is determined by a physician. Herein, the denial of a benefit is determined by a Prairie States' Registered Nurse not by a doctor and an appeal is decided by the City's Risk Management Committee. There is no evidence that any member of the City's Risk Management Committee has any medical expertise. Thus unlike CLARK COUNTY, the grievance challenges a determination made by the City. The Arbitrator concludes that because the City, through the City's Risk Management Committee, has the final determination when a benefit is approved or denied the City is the final determiner, not Prairie States. Article IV provides that any misunderstanding that may arise between the City the Union concerning wages, hours and conditions of employment as provided in the collective bargaining agreement is subject to the grievance procedure. The Arbitrator concludes what level of benefit exists and the City's actions in determining that level can be grieved. Particularly where, as herein, the decisions are made by non-physicians and final decisions are clearly made by the City. Thus, based upon the above and foregoing and the testimony, evidence and arguments presented the Arbitrator finds the grievance arbitrable.

Turning to the merits of the grievance the record demonstrates that the Grievant's doctor determined the Grievant "…needs a separate pair of orthotics with a more rigid arch for athletics." The Arbitrator acknowledges he is not a medical expert. The Arbitrator does not have the expertise to dispute the Grievant's Doctor's diagnosis. However, neither did the City. The record demonstrates the City denied the request for a second pair of orthotic inserts primarily on the basis that industry standards have a replacement standard of three (3) years (Jt.

Ex. 4). The record also demonstrates that Prairie States Register Nurse denied the request for a

second pair of orthotic inserts primarily because the replacement standard for durability is a minimum three (3) to five (5) years and duplication of durable medical equipment is not covered by the City's medical benefit plan (Jt. Ex. 4). However, it is clear from the Grievant's Doctor's request he was not seeking a replacement, duplicate or extra pair of orthotic inserts but a distinctly different set of orthotic inserts (higher arch support). There is no evidence Prairie States or the City denied the request for the orthotic inserts for the Grievant's athletic shoes on the basis of athletics being a convenience as the City claimed at the hearing.

The Arbitrator notes here that a denial on the basis of "convenience" because an employee desired a duplicate or extra pair of orthotic inserts so the employee did not have to transfer the inserts from one form of foot wear to another would have merit. The Arbitrator also notes here that a denial on the basis of the equipment not being "durable medical equipment" would have merit if the athletic footwear the Grievant desired the orthotic inserts for was to be used for footwear that could not be worn in the Grievant's home, such as baseball shoes with cleats or golf shoes with cleats. However, as noted above, denial of the benefit was made on the basis of duplication and replacement standards.

The Arbitrator also finds no merit in the City's claim that participation in athletics is a not "medically necessary." Again, as noted above, the denial decision was not based upon the type of use the Grievant intended the orthotic inserts for but on the basis it was deemed a duplicate and/or replacement and solely for these reasons. The City did not deny the request because the Grievant was physically active individual. Further, the term "convenience" in Section 2.28 of the City's summary plan description states an item is not medically necessary it is provided "…solely for the convenience of the patient…". *Webster's New World Dictionary* defines convenience as:

> **Convenience**: *1. the quality of being convenient, 2. comfort, 3, anything that adds to one's comfort or saves work – at someone's convenience at a time or place suitable to someone*
>
> **Convenient**: *easy to do, use, or get to, handy*

Participation in athletics clearly is not a convenience. Convenience would be a second pair of orthotic inserts of the same prescription. But that was not what was requested. A different orthotic insert was requested.

The Arbitrator notes here that he is not making a determination as to whether the orthotic inserts the Grievant has requested is "medically necessary." That determination was made by the Grievant's doctor. The record also demonstrates that Prairie States did not deny the Grievant's request because it viewed the second pair of orthotic inserts as not "medically necessary" but denied the request solely on the basis that the Grievant was requesting duplicate orthotic inserts. Herein the Grievant's doctor has determined the Grievant needs a different insert for different footwear. This is clearly not a duplicate orthotic insert.

A careful review of the City's medical benefit plan demonstrates, as Surek testified at the hearing, there is no specific limitation on the number of different orthotic inserts. Therefore,

based upon the above and foregoing, and the testimony, evidence and arguments presented the Arbitrator concludes the City violated the collective bargaining agreement when it denied the Grievant's request for orthotic inserts with a higher arch. The City is directed to pay for the second type of orthotic inserts.

AWARD

The grievance is arbitrable.

The City violated the collective bargaining agreement when it denied the Grievant a second pair of different orthotic inserts for use with a different shoe. The City is directed to grant the Grievant's request and pay for the different pair of orthotic inserts.

Dated at Madison, Wisconsin, this 10th day of February, 2005.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
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